QUESTIONS PRESENTED

The only real question presented to this Court is whether this Court should remand this case to the United States District Court for an evidentiary hearing regarding whether LTV Steel Company, Inc. can afford restoration of the pension plans in question.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-390

PENSION BENEFIT GUARANTY CORPORATION,

PETITIONER

v.

LTV CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT BANCTEXAS DALLAS, N.A.

STATEMENT OF THE CASE

The statement of the case is accurately presented by the Pension Benefit Guaranty Corporation in its brief.

SUMMARY OF ARGUMENT

This case concerns the Pension Benefit Guaranty Corporation's ("PBGC") efforts to reinstate pension plans of LTV Steel Company, Inc. ("LTV Steel") which were improvidently terminated. The District Court ruled that reinstatement of these improvidently terminated pension plans was appropriate if the PBGC could demonstrate, by providing a sufficient administrative record, that the plans would not be inevitably re-terminated. The District Court further ruled that the PBGC had not provided a sufficient administrative record to demonstrate the affordability of the pension plans

by LTV Steel. On appeal the Second Circuit affirmed in all respects the District Court's decision. 875 F.2d 1008.

BancTexas maintains that the PBGC had the right to restore the pension plans in question if such restoration will not inevitably result in retermination of the effected pensions plans. Thus, BancTexas Dallas, N.A. ("BancTexas") believes that the Second Circuit's decision should be affirmed and this case remanded to the District Court. At the District Court, the PBGC can quickly and easily supplement its administrative record by presenting evidence to the District Court to demonstrate that restoration of the terminated pension plans pursuant to Section 4047 of The Employee Retirement Income Security Act of 1974, as amended ("ERISA") was appropriate, that LTV Steel can afford the restored plans, and that subsequent retermination is not inevitable.

ARGUMENT AND AUTHORITIES

The PBGC posited two theories for restoration of the pension plans. First, the PBGC contended that utilization of a follow-on plan constituted a substantial abuse and justified restoration. The PBGC has fully elaborated on this theory in its brief.

Second, the PBGC concluded that restoration was warranted because the fortunes of LTV Steel had improved to the point where LTV Steel could now afford to make the required payments if the pension plans were restored. This "affordability" theory is also discussed by the PBGC in its brief. The District Court ruled, and the Second Circuit affirmed, that the PBGC could not prevail on its "abuse" theory because it was legally and factually unsound.

Likewise, the Second Circuit affirmed the District Court's finding that although the administrative record of the PBGC was not complete enough to support its affordability theory,

if the PBGC could supplement its administrative record to demonstrate affordability, restoration of the pension plans was proper pursuant to Section 4047 of ERISA. (875 F.2d 1008 at pg. 1020.)

The PBGC cannot prevail under either its abuse theory or its affordability theory unless it demonstrates that restoration of the pension plans will not inevitably lead to retermination and that LTV Steel can afford to service the restored pension plans. In order to prevail under its "abuse" theory, the PBGC must establish additional factors, including the inherent legal viability of the theory. Devotion of this Court's time to this academic question of "abuse" is an exercise in redundancy since restoration of the pension plans is appropriate if affordability is established and "abuse" cannot be established absent affordability.

BancTexas fails to understand why the PBGC does not simply present competent evidence directly to the District Court in support of its affordability theory.* Everyone, including the PBGC, agrees that it would be improper for the PBGC to restore the pension plans if retermination of the pension plans is inevitable. Consequently, in order to act appropriately under Section 4047 of ERISA, the PBGC must be able to demonstrate that it is reasonably likely that the pension plans will not require retermination in the near future. Both the District Court and Second Circuit's opinion give the PBGC the opportunity to make such a determination either directly to the District Court or through an administrative process which will subsequently be reviewed by the District Court under an arbitrary and capricious standard.

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* Perhaps the PBGC's approach, and its current financial plight, can be attributed to the fact that the PBGC was modeled after the now defunct Federal Savings and Loan Insurance Corporation. See FN4 and text accompanying FN5, pgs. 3 and 4 of the PBGC Brief.

Instead of wasting this Court's time attempting to establish its abuse theory, the PBGC should present evidence directly to the District Court since it cannot prevail under either an abuse theory or an affordability theory unless it can establish affordability.

While the media has widely reported the District Court and Second Circuit's opinions as a victory for LTV Steel, BancTexas believes that ultimately the ruling is more beneficial to the PBGC since the ruling established the PBGC's right to reinstate the pension plans upon a simple showing that the fortunes of LTV Steel have improved to the point where LTV Steel can now afford to fund the reinstated plans. Mechanisms exist under the Bankruptcy Code which will allow the available cash flow of LTV Steel to be utilized to fund reinstated pension plans.

The Chapter 11 case of LTV Steel has been pending since June of 1986. For reasons which remain unarticulated, the PBGC has failed to supplement its administrative record regarding the restoration of the pension plans in question. In the meantime, creditors and other parties-in-interest have been stymied in their attempts to reorganize LTV Steel and its affiliates, including The LTV Corporation ("LTV"). Although some further delay is inevitable, neither the Bankruptcy Code nor ERISA contemplates protracted administrative review which will further delay the reorganization of LTV Steel and LTV. The PBGC has admitted its inability and unwillingness to balance the competing policies of the Bankruptcy Code and ERISA. PBGC Brief, Part III. To the extent possible, further delay should be avoided. Under these circumstances, further development of an administrative record by the PBGC would be superfluous since such action will be inevitably reviewed by the District Court which can and will balance the appropriate competing statutory policies. *See Midlantic National Bank v. New Jersey*

Department of Environmental Protection, 474 U.S. 494 (1986). The rights of all the parties, including the PBGC, LTV Steel, LTV and their respective creditors and other parties-in-interest will be best served by a direct presentation by the PBGC to the District Court of its evidence regarding affordability. No provision of ERISA prohibits such a procedure. Accordingly, the decision of the Second Circuit should be affirmed and this case should be remanded to the District Court for an evidentiary determination of the affordability issue.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, BancTexas respectfully prays that this Court affirm in all respects the Second Circuit's decision of May 12, 1989, and remand this case to the District Court for an evidentiary hearing on the issue of affordability.

RESPECTFULLY SUBMITTED,

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January 1990

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April 1, 1988

Judge William Ditter
Federal District Court
Eastern District of Pennsylvania
601 Market St.
Philadelphia, Pennsylvania 19106

Dear Judge Ditter: RE: CPI vs Medtronic lawsuit

I am writing to you as a concerned physician regarding the welfare of my patients. I hope to reveal to you how the financial scrapping of two medical device companies (Medtronic and CPI) ignores the very real human issues at hand.

I really don't know what transpired in the lawsuit between CPI and Medtronics from the viewpoint of patent rights, nor do I care. From my perspective, it doesn't matter who has the patent rights or who makes the most money from these devices. I do, however, care a great deal when legal business decisions prevent me from taking the very best care of my patients as possible. If I am legally prevented from using the new Medtronic device, I must then knowingly provide substandard care for my patients. This places me and others like me in a medically and ethically untenable position.

As an academic physician with extensive experience in the care of patients with life-threatening heart rhythm disorders, and as a physician and scientist who has extensive experience in the use of both the CPI and the Medtronic defibrillation systems, it is clear to me that many of my patients will suffer and some will die needlessly because I am forced to limit my therapies to the one provided by CPI. These two devices are no more alike than sulfa and penicillin are alike; sulfa and penicillin are both antibiotics but they serve different roles. The CPI AICD and the Medtronic PCD are both devices that treat heart rhythm disorders but their capabilities are very seriously different.

In short, one company's desire to have a monopoly on implantable defibrillators (i.e., CPI) subjects we physicians and our patients to limited therapeutic alternatives and forces us to use a product that isn't as well suited to patient care as another may be. On a very human level, it is important to recognize that the proceedings by CPI have already seriously and adversely affected a 55-year-old woman, Lauretta Olmstead from Seattle, Washington, in whom I was hoping to use the considerably smaller and much more appropriate Medtronic device. I hope to impart to you why more is at stake than just corporate patents and corporate income by relaying some background history regarding this woman to you. Mrs. Olmstead suffered an episode of sudden death due to ventricular fibrillation and was fortunate enough to be resuscitated by her husband and by paramedics. Having had one episode of sudden death aborted does not, however, spare her from recurrent episodes. In fact, she has a 30% risk of dying if nothing were to be done to prevent another cardiac arrest. To prevent another cardiac arrest, however, requires an automatic defibrillator. The only one available (legally) for Mrs.

Olmstead is the CPI automatic defibrillator which, however, is a poor second choice in this patient compared to the Medtronic device that is ideally suited to Mrs. Olmstead for two reasons: first, the Medtronic unit is much smaller than the CPI unit which is a crucial consideration in this tiny 75 lb woman and, second, the Medtronic unit is able to prevent the need for shocking her heart while the CPI unit is not. As such, I was hoping to implant it in her on March 24, 1988. However, I've had to cancel her surgery twice because of the legal proceedings as I was waiting for the case to be resolved before I could use the newer Medtronic unit. When I was told by Medtronic that I couldn't legally insert the device, I was astounded. The word "astounded" is overworked and often used as a hyperbole, but it nonetheless accurately represents my response as well as the response of my patient, her husband, and her daughters. I knew and they knew that I had a way to help my patient but I was prevented from doing so by greed on the part of a corporation.

As it turned out, after I was told I could not use the new Medtronic unit, I reluctantly implanted the 200 cc squarisn CPI device in her tiny abdomen on March 28, 1988 rather than the smaller, rounded 103 cc Medtronic device. This was no trivial issue. I've enclosed photos of this woman's belly taken in the operating room to make my point. I've drawn on her skin with surgical ink along the lower margins of her rib cage and the upper margins of her hip bone to emphasize to you how little room there is in her abdomen. As you look at these photos, you need to be aware that the abdominal anatomy prevents insertion of these devices in the middle of the abdominal wall because of a dividing raphe and the umbilicus. They must be inserted to the right or to the left of the midline and umbilicus. Because these devices must be inserted either to the right or to the left of the umbilicus they must also fit between the lower rib margin and the hip bone. In this woman, there literally is no room for a comfortable implantation of the CPI unit; by inserting the CPI unit in her, we had to jam it between her rib cage and her hip bone. As a consequence, the CPI unit was so tightly inserted that it prevents her from comfortably bending over because the metal canister of the CPI unit is forced into her bony hip by her ribs each time she bends at the hip. Imagine having the choice between no defibrillator (and the resultant lack of protection from sudden death) and a defibrillator that jams into your ribs every time you bend over, go to the bathroom, sit down to eat, or have sex. By using the much smaller Medtronic device, we could have avoided the discomfort and limitations of motion the CPI device created.

A second and equally important consideration in Mrs. Olmstead's case is the fact that the Medtronic device can prevent the use of a painful shock. High voltage electric shocks is the only way the CPI device can stop her life threatening heart rhythm problem. The Medtronic device, on the other hand, can actually avoid the need for these painful shocks by a technique called "rapid ventricular overdrive pacing" which can stop her ventricular tachycardia before it requires a high voltage shock.

Judge Ditter, Mrs Olmstead's story is not unique to me or my colleagues around this country who specialize in the care of such difficult patients. There are many like her where the Medtronic unit would be a more safe, effective and less painful way of protecting the patient from sudden death. For example, the accuracy of detection of serious arrhythmias by the CPI device is not failproof. Another one of my patients, Wesley Ray, is only one of 18 patients who have been

inappropriately shocked by the CPI device. Mr. Ray was shocked 4 times for a relatively benign heart rhythm problem called atrial fibrillation because of faulty detection circuitry of the CPI device. The Medtronic unit, on the other hand, has a very clever way of discriminating between the relatively benign rhythm problems of atrial fibrillation and the more serious problems of ventricular tachycardia and ventricular fibrillation. It would be unfortunate for our patients to be deprived of the Medtronic device's capabilities because of capitalistic sophistry from a competing business.

Mrs. Diana Tucker, whose personal letter and photo of her abdomen is enclosed, illustrates yet another reason why business interests should not interfere with the best medical care possible. She had the need for both a regular pacemaker as well as an automatic defibrillator and, unfortunately, had to have two surgeries and two medical devices implanted when a single device, the Medtronic unit, would have done the job for her quite well. Unfortunately, because I was legally prevented from inserting the Medtronic device, she now suffers from having two devices.

As a physician deeply dedicated to the well being of my patients, I am abhorred by what has happened. I have used the CPI device for the 8 years it has been available and have been grateful for it and for Dr. Mirowski's contribution. But, my first allegiance is to my patients and not to CPI, Medtronic or Dr. Mirowski. If I know I can take care of my patients better with newer technology, then it is incumbent upon me to do so. From my perspective, the incredible greed of CPI has callously sacrificed the welfare of human beings for a profit. The whole proceeding is tantamount to saying that we shouldn't allow progress and improvements in health care nor should we allow patients to live longer and better because it will hurt the profit margin of a company (CPI).

Please allow me to do what is best for our patients by giving me access to state of the art medical technology provided by Medtronic. I'd be more than pleased to answer any questions you may have. You also can feel free to talk to any of my patients if it will help you.

Respectfully yours,

Gust Bardy

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GHB:ltk-3473A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

J. WILLIAM DITTER, JR.
JUDGE

9614 UNITED STATES COURT HOUSE
INDEPENDENCE MALL WEST
PHILADELPHIA PA 19106
597 9640

April 13, 1988

Gust H. Bardy, M.D.
Director, Cardiac Pacing
Harborview Medical Center
325 Ninth Avenue
Seattle, Washington 98104

Dear Dr. Bardy:

I have read and reread your very interesting letter of April 1, 1988. I hope you will try to understand this response.

When the delegates to the Constitutional Convention met in Philadelphia in 1787, they included in the document they drafted a provision "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." After the constitution was ratified, one of the first acts of the Congress in 1790 was to enact laws for the protection of inventors and authors. Over the years, there have been many revisions to the original patent act, but the theory remains the same: society is best served by encouraging invention and the only way to encourage invention is to provide a means for the inventor to profit from his labors.

I tell you all this because when I became a judge, I took an oath to support and defend the constitution and the laws of the United States and to do equal right to all persons.

That brings me to your letter. Stripped to its essentials, your letter asks me to forget the wisdom of the patent system, ignore the constitution and the laws of the United States, accept evidence from you without your being subjected to cross-examination, and act upon that evidence without any opportunity for rebuttal from CPI.

April 13, 1988

Dr. Bardy:

Doctor, I know that you have the best interests of your patients in mind. Still, I am a little surprised when you say that you do not know what transpired between CPI and Medtronics and that you do not care. While that may be your way of expressing your great concern for your patients, the fact remains that the suit is a matter of great consequence to the entire medical profession, those who are medical inventors, those who are medical investors and thus make invention possible, and society as a whole. Although I think it might have been a little fairer on your part to point out to me that you are one of Medtronic's investigators, I commend you for your concern for those who have come under your care. I hope you will understand, however, that my duty is not only to them but to the constitution and laws of the United States as well. Congress has not seen fit to treat the inventors of medical devices with less deference than it treats those who invent trivial and comparatively unimportant devices. Perhaps Congress should do so, but until that time I must interpret the present law.

Yours sincerely,

J William Stiller Jr

JWD:RMC